

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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In the Matter of JUTILA, Minors.

UNPUBLISHED

August 12, 2014

No. 320421

Marquette Circuit Court

Family Division

LC No. 11-009461-NA

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Before: M. J. KELLY, P.J., and SAWYER and HOEKSTRA, JJ.

PER CURIAM.

Respondent appeals as of right from the trial court's order terminating his parental rights to his children pursuant to MCL 712A.19b(3)(c)(ii) and (g). Because the trial court did not clearly err in terminating respondent's parental rights and respondent's other arguments are without merit, we affirm.

In December 2011, petitioner filed a petition against respondent and D. Pegg seeking temporary custody of respondent and Pegg's two children, as well as Pegg's two older children from a different relationship. The petition alleged that respondent touched one of the older children in an inappropriate manner, that Pegg gave the older children cigarettes and marijuana, that respondent and Pegg grew marijuana, and that the older children took respondent's medical marijuana from respondent's unsecured lock box.

Pegg pleaded no contest to the allegation that she furnished cigarettes to her daughters, and respondent pleaded no contest to the allegation that he failed to secure the lock box in which he stored his medical marijuana after discovering that two of the children had broken into the box. The trial court accepted the pleas and exercised jurisdiction over the children.

On April 5, 2012, petitioner filed a petition seeking emergency removal of the children from the home, alleging that on April 4, 2012, law enforcement officers found a methamphetamine laboratory in the home. Respondent and Pegg were arrested, and the children were taken into protective custody. Following a hearing, the trial court ordered that the children be placed together in a non-relative foster home.

On August 23, 2013, Pegg released her parental rights to all four children. A supplemental petition seeking termination of respondent's parental rights was filed on September 20, 2013. Following a hearing, the trial court found that termination of respondent's parental rights was warranted under MCL 712A.19b(3)(c)(ii) because conditions other than those alleged in the original petition continued to exist. Respondent's arrest and conviction of possession of

methamphetamine was evidence that respondent was not complying with the treatment plan. The trial court found that respondent's greatest barrier to reunification was his incarceration, noted that respondent had received infraction tickets while in prison, and concluded that respondent's emotional stability and substance abuse continued to be of concern. The trial court found that respondent was not able to support his children because he was incarcerated. The court acknowledged that respondent had worked on some of his issues in prison, but concluded that those issues could not be rectified within a reasonable time, especially given the possibility that respondent could remain incarcerated until 2022.

In addition, the trial court found that termination of respondent's parental rights was warranted under MCL 712A.19b(3)(g). The trial court noted that the children had been out of respondent's care since April 4, 2012, and that it was possible that respondent would remain incarcerated until 2022. The court found that respondent would be unable to provide proper care and custody for his children within a reasonable time because he had no way of supporting the children and could not provide a plan for their care while he was incarcerated. The trial court also found that the children did not have a bond with respondent and that it was unlikely that respondent could overcome his issues within a reasonable time upon his release from prison.

The trial court also found that termination of respondent's parental rights was in the children's best interests. Respondent manufactured or allowed the manufacture of methamphetamine in the home, did not demonstrate appropriate parenting skills, and made no effort to contact the children after he was incarcerated. The court found that the foster home provided the children with the love, permanency, and stability they needed. Having found statutory grounds for termination and that termination would be in the children's best interests, the trial court terminated respondent's parental rights.

On appeal, respondent first argues that the trial court erred by asserting jurisdiction over his two children because neither the original petition nor the amended petition contained allegations that he or Pegg abused or neglected either child, and the court's jurisdiction over the two older children did not provide the court with jurisdiction over their siblings. Respondent asserts that the trial court erred by asserting jurisdiction over respondent's children without holding an adjudicatory hearing that pertained specifically to those children.

Initially, we note that respondent's argument, raised in his appeal from the termination of his parental rights, presents an impermissible collateral attack on the trial court's exercise of jurisdiction. The trial court exercised jurisdiction over the children following an adjudicatory hearing at which both Pegg and respondent entered no contest pleas to allegations in the petition. Respondent did not appeal the trial court's exercise of jurisdiction, and subsequently, following a supplemental petition, his parental rights were terminated. Had respondent wished to challenge the trial court's exercise of jurisdiction, he needed to do so in a direct appeal from the earliest order appealable as of right because "an adjudication cannot be collaterally attacked following an order terminating parental rights." *In re S.L.H.*, 277 Mich App 662, 668-669 & n 13; 747 NW2d 547 (2008). By not appealing the trial court's exercise of jurisdiction, respondent lost his right to

raise his jurisdictional challenge and we need not consider the merits of his claim.<sup>1</sup> See *In re Wangler/Paschke*, \_\_ Mich App \_\_, \_\_; \_\_ NW2d\_\_ (2014), slip op at 4-5.

In any event, respondent's jurisdictional claim is without merit. Because respondent failed to raise this issue below, our review is for plain error. *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008). In order for a child to come within the jurisdiction of the court, the court must hold a trial, MCR 3.972, or a respondent may enter a plea of admission or no contest to an allegation in the petition. MCR 3.971(A). The purpose of such a proceeding is to determine whether the child comes within the trial court's jurisdiction. MCL 712A.2; see also *In re Nunn*, 168 Mich App 203, 207; 423 NW2d 619 (1988). The allegations in a petition must be proven by a preponderance of the evidence. MCR 3.972(C)(1). A trial court can exercise jurisdiction over a child "[w]hose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult, or other custodian, is an unfit place for the juvenile to live in." MCL 712A.2(b)(2).

In this case, respondent correctly observes that neither the original petition nor the amended petition contained specific allegations that he or Pegg specifically neglected or abused the two youngest children. However, respondent pleaded no contest to the allegation that he left his medical marijuana in an unsecured container that was accessible to the children. Leaving marijuana in a container accessible to children, especially very young children, would pose a health danger to those children. A home in which marijuana was accessible to young children would constitute an "unfit place" for the children to live. MCL 712A.2(b)(2). While only the elder children actually gained access to the marijuana, the younger children were also placed at risk, and, moreover, a parent's treatment and neglect of one child may provide a basis for exercising jurisdiction over other children where such treatment is indicative of how the parent would treat the other children. *In re BZ*, 264 Mich App 286, 296; 690 NW2d 505 (2004); *In re*

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<sup>1</sup> Relying on *In re Hatcher*, 443 Mich 426, 438; 505 NW2d 834 (1993), respondent argues on appeal that he is not contesting the trial court's exercise of jurisdiction, but whether the trial court had subject matter jurisdiction in the first instance, an issue which respondent asserts may be attacked, even collaterally, at any time. However, like the respondent in *In re Hatcher*, respondent has confused the distinction between subject matter jurisdiction and the trial court's valid exercise of that jurisdiction. *Id.* 438-439. "[A] court's subject matter jurisdiction is established when the proceeding is of a class the court is authorized to adjudicate and the claim stated in the complaint is not clearly frivolous." *Id.* at 444. A family court has subject matter jurisdiction over a large class of cases involving children, including those where a child's parents are neglectful or have failed to provide a fit home. MCL 712A.2(b)(2). See also *In re AMB*, 248 Mich App 144, 167; 640 NW2d 262 (2001). Whether the exercise of that jurisdiction in a particular case is valid "is determined from the petition;" that is, the trial court properly exercises its jurisdiction when there is probable cause to believe that the allegations contained in the petition are true. *In re Hatcher*, 443 Mich at 444. Respondent, who now challenges the trial court's assumption of jurisdiction in a case involving allegations of parental neglect, has plainly brought a challenge to the court's exercise of jurisdiction, which may not be raised in a collateral attack. See *id.*

*Foster*, 285 Mich App 630, 631; 776 NW2d 415 (2009). Certainly, the court was not required to wait until the younger children had also accessed the drugs in order to exercise jurisdiction. Thus, the trial court did not err in exercising jurisdiction over all the children.

Next, respondent argues that petitioner failed to make a reasonable effort to provide him with reunification services after he was incarcerated in April 2012. Respondent acknowledges that he was not allowed to participate in services while he was in the county jail because he had not been sentenced; however, respondent argues that petitioner should have given him some type of assignment that he could complete during that time. Further, respondent contests the sufficiency of the services provided after he was sentenced to prison, maintaining that petitioner helped him get on waiting lists for services, but otherwise gave him only some chapters of a parenting workbook to study and sent him only two photographs of his children. Respondent contends that petitioner's efforts in this respect were inadequate.

Because respondent did not challenge the reasonableness of the services below, our review is for plain error affecting substantial rights. *In re Utrera*, 281 Mich App at 8. "Reasonable efforts to reunify the child and family must be made in all cases" except those involving specific aggravated circumstances not present in the current case. MCL 712A.19a; *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). Termination of parental rights where a respondent is not afforded a meaningful and adequate opportunity to participate in proceedings may be premature. *In re Mason*, 486 Mich at 152.

In this case, the trial court found that petitioner offered respondent and Pegg numerous services from the beginning of the case to the termination hearing, including services through Families First, Early On, Family Support Education; counseling services; mediation; food assistance; housing assistance; foster care services; medical, dental, and mental health services for the children; speech therapy; occupational therapy; evaluation at a developmental specialty clinic; contact with respondent after respondent was incarcerated; contact with respondent's prison counselor; and provision of parenting workbook materials to respondent in prison.

Respondent acknowledges that these services were provided, but contends that the services provided after he was incarcerated were inadequate. Respondent asserts that petitioner did not give him parenting homework while he was in the county jail, and then after he was transferred to prison did not aid him in maintaining contact with his children through telephone calls, letters, or other methods. Respondent asserts that the trial court denied petitioner's request to file a termination petition at the time of the permanency planning hearing because it found that reasonable services had not been provided to respondent.

Respondent's claims are without merit. Petitioner provided extensive services before respondent's incarceration and, thereafter, petitioner provided what services were possible under the circumstances. Petitioner could not control jail or prison policies pertaining to what services respondent could receive in those facilities. Moreover, respondent's assertion that the trial court denied petitioner's request to file a termination petition at the time of the permanency planning hearing is inaccurate. In fact, the trial court found that reasonable efforts were being made to provide respondent with services, but acknowledged that the circumstances of respondent's incarceration made provision of services difficult. The trial court declined to order that a

termination petition be filed at that time because it wanted to see if respondent could make further progress.

Moreover, this case is unlike *In re Mason*, 486 Mich at 142, in which our Supreme Court reversed an order terminating the respondent's parental rights because the petitioner erroneously refused to provide the respondent with services or to include the respondent in the proceedings because he was incarcerated. See *id.* at 169. In the instant case, respondent participated in all hearings, and he was provided with the services available to him in jail and prison. The trial court did not clearly err in finding that petitioner made reasonable efforts to provide services to respondent.

Next, respondent argues that the trial court clearly erred in finding that termination of his parental rights was justified under MCL 712A.19b(3)(c)(i) and (g). We review for clear error the trial court's determination that a ground for termination has been proven by clear and convincing evidence. See MCR 3.977(K); *In re Rood*, 483 Mich 73, 90; 763 NW2d 587 (2009). "A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made." *In re Ellis*, 294 Mich App 30, 33; 817 NW2d 111 (2011). We must give regard "to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." *Id.*

The trial court terminated respondent's parental rights under MCL 712A.19b(3)(c)(ii) and (g), which permit termination under the following circumstances:

(c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds . . .

(ii) Other conditions exist that cause the child to come within the court's jurisdiction, the parent has received recommendations to rectify those conditions, the conditions have not been rectified by the parent after the parent has received notice and a hearing and has been given a reasonable opportunity to rectify the conditions, and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

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(g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

The trial court found that termination of respondent's parental rights under MCL 712A.19b(3)(c)(ii) was warranted based on respondent's substance abuse, criminality, incarceration, and failure to provide support and a proper home for his children while he is incarcerated. The evidence showed that the children were removed from respondent's custody on April 4, 2012, when respondent and Pegg were arrested for manufacturing and possessing methamphetamine. Respondent's earliest release date from prison is in 2015, but he could remain incarcerated until 2022. Respondent demonstrated negative behavior in prison, and

received several tickets for substance abuse. Although incarceration alone is not a basis for terminating parental rights, see *In re Mason*, 486 Mich at 161, respondent failed to put forth a viable plan for his children's care during his incarceration. He asserted that his brother had expressed a willingness to care for the children, but ultimately respondent's brother declined to do so. Respondent asserts that the trial court should not have relied on this old information regarding his brother's willingness, but he has made no showing that any more recent information would have supported a finding that his brother, or any other family member, was willing to care for the children during respondent's incarceration. Respondent's inability to care for the children during his incarceration would cause the children to come within the trial court's jurisdiction, and respondent failed to rectify this condition because he did not put forth a plan for the care of his children during his incarceration. The trial court did not clearly err in finding that termination of respondent's parental rights was warranted under MCL 712A.19b(3)(c)(ii).

The trial court found that termination of respondent's parental rights under MCL 712A.19b(3)(g) was warranted based on the evidence that respondent's criminal behavior exposed the children to danger and deprived them of a home when respondent and Pegg were arrested. The evidence showed that when the children were removed from the home they suffered from lice infestation and poor dental hygiene. Respondent asserts that the trial court should not have relied on evidence of his past behavior when determining whether he could provide proper care and custody for his children and instead should have examined his future prospects. However, respondent's assertions that he would be employed as soon as he left prison and would have appropriate housing with his mother were unsupported, and the trial court's reliance on those assertions would have constituted pure speculation. Furthermore, the fact that respondent could remain incarcerated until 2022 and had no means of fulfilling his duty to provide proper care and custody while incarcerated, cf. *In re Mason*, 486 Mich at 163, constituted evidence on which the trial court was entitled to rely to find that no reasonable expectation existed that respondent would be able to provide proper care and custody for the children within a reasonable time considering the children's ages (three and two years old) at the time of the termination hearing. The trial court did not clearly err in finding that clear and convincing evidence supported termination of respondent's parental rights under MCL 712A.19b(3)(g).

Next, respondent argues that the trial court clearly erred by finding that termination of his parental rights was in the children's best interests. Once the petitioner has established a statutory ground for termination by clear and convincing evidence, the trial court shall order termination of parental rights if it finds that termination is in the child's best interests. MCL 712A.19b(5); *In re Olive/Metts*, 297 Mich App 35, 40; 823 NW2d 144 (2012). "[T]he preponderance of the evidence standard applies to the best-interest determination." *In re Moss*, 301 Mich App 76, 83; 836 NW2d 182 (2013). In determining a child's best interests, the trial court may consider "the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home." *In re Olive/Metts Minors*, 297 Mich App at 41-42 (internal citations omitted). See also *In re VanDalen*, 293 Mich App 120, 141; 809 NW2d 412 (2011). We review the trial court's best interests determination for clear error. *In re White*, 303 Mich App 701, \_\_; 846 NW2d 61 (2014); slip op at 6.

Respondent's children were removed from the home after respondent and Pegg were arrested for manufacturing methamphetamine in the home. The trial court further found a lack of a bond between respondent and the children. Although respondent contends that petitioner caused the lack of a bond by failing to facilitate contact, no evidence showed that respondent requested assistance, such as funds for stamps or telephone calls, to allow him to contact the children. The evidence showed that one child had physical needs, i.e., trouble with speaking and walking when he went into foster care, but that he had made progress while living with his foster parents. The evidence also showed that both children looked to their foster parents to fulfill their needs. The trial court appropriately considered these factors when deciding whether termination of respondent's parental rights was in the children's best interests. *In re VanDalen*, 293 Mich App at 141. Respondent asserts that the trial court failed to consider that he was participating in services available to him in prison and that he would be able to support his children after he was released from prison. However, as discussed, respondent could not provide a plan for his children's care during his incarceration, and the trial court thus sensibly concluded it would be unreasonable to make the children wait years for permanency and stability. Overall, the trial court did not clearly err in determining that termination of respondent's parental rights was in the children's best interests. See *In re White*, slip op at 6.

Finally, respondent argues that he was denied an impartial decision maker because the presiding judge had previously participated in his criminal matter as a prosecutor. Respondent argues that, at a minimum, this created an appearance of impropriety.

While respondent now challenges the trial court's involvement, at trial respondent offered no such objection and in fact waived any such argument. The trial court raised the issue of its previous involvement in respondent's criminal case at a review hearing, and gave respondent the opportunity to "make any record you'd like of that issue." Counsel for respondent stated that he and respondent had "no issue" with the trial court's involvement, and did not feel that taking further action was "necessary." Counsel for respondent affirmatively stated that he and respondent were not troubled by the trial court presiding over the child protection proceeding, and declined the opportunity to object or take other action. This response constitutes a waiver of any claim relating to the trial court's continued participation in the matter. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Affirmed.

/s/ Michael J. Kelly  
/s/ David H. Sawyer  
/s/ Joel P. Hoekstra